U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 December 2004

BALCA Case Nos.: 2004-INA-361 and 362
ETA Case Nos.: P2003-OH-05424210 and P2003-OH-05424213

In the Matters of:

QWEST COMMUNICATIONS,
Employer,

on behalf of

ROHIT PANWAR and AJITH WAIDYARATNE,
Aliens.

Certifying Officer: Raymond Moritz
Chicago, Illinois

Appearance: Gus M. Shihab, Esquire
Shihab & Associates Co., LPA
For the Employer and the Aliens

BEFORE: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. These alien labor certification matters arise under section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the implementing regulations at 20 C.F.R. Part 656. Because the same or substantially similar evidence is relevant and material to both of these appeals, we have consolidated the matters for decision. *See* 29 C.F.R. § 18.11.

Employer filed applications for labor certification on behalf of Rohit Panwar for the position of Senior Software Development Engineer on December 17, 2001 (PAF 1) and on behalf of Ajith Waidyaratne for the position of Software Engineer on December

24, 2004. (WPAF 1).1 Both positions were located in Dublin, Ohio. The Employer conducted a recruitment supervised by the State Workforce Agency during March through May 2003.

On November 21, 2003, the CO issued Notice of Findings in both cases proposing to deny labor certification. (PAF 14-16; WAF 15-17). Citing 20 C.F.R. § 656.20(c)(8) and 656.24(b), the CO observed that from January 2002 through December 2002 the employer may have laid off workers who would qualify for the position for which labor certification is sought. The CO requested information from the Employer about the layoffs. Specifically, the CO asked:

> **Within the period from January 2002 through December 2002 has Qwest Communications, Inc. laid off any workers in the area of intended employment in the occupation of Software Engineer (DOT code 030.062-010)?**
>
> **If the employer has laid off any Software Engineers (DOT code 030.062-010), provide the number of workers that were laid off.**
>
> **Provide documentation of the consideration given to the laid off workers for the position for which certification is sought. If any U.S. workers were rejected for the position for which certification is sought, the employer must provide the lawful job related reasons for each worker rejected according to the regulations at 20 CFR 656.21(b)(5).**

(PAF 15; WAF 16) (emphasis as in original).

In response, the Employer conceded that it had laid off Software Engineers during the time period identified by the CO. The Employer provided a chart showing where the layoffs occurred. The Employer's documentation showed a total of 58 laid off employees nationwide. Five employees had been laid off in Dublin, Ohio. The Employer stated that the lay offs were the result of a reduction of its workforce. (PAF 17-20; WAF 18-21). The Employer provided no explanation for why laid off workers were not considered for

[1] Citations to the Appeal File in Case No. 2004-INA-361 are identified as "PAF". Citations to Case No. 2004-INA-362 are identified as "WAF."

the positions for which labor certification is sought.

In Final Determinations dated July 9, 2004, the CO found that the Employer's rebuttal failed to show that it had given consideration to the laid off U.S. workers, and therefore labor certification could not be granted. (PAF 21-23; WAF 22-24).

The Employer and the Aliens filed Motions for Reconsideration/Petitions for BALCA review.2 The Employer's and Aliens' argument is that the Employer conducted a recruitment effort supervised by the State Workforce Agency. They state that the Employer advertised in a local newspaper, posted internal notices and received no applicant referrals from the SWA. They argue that the CO used the wrong time period for looking at layoffs because the Employer had filed the applications in December 2001, not 2002. Therefore, the Employer and the Aliens argue that the CO should have looked at layoffs from June 2001 through December 2001, citing in support the "Zeigler Memo" of March 20, 2002. They argue that if the Employer's recruitment efforts had been deemed inadequate, it should have been given the opportunity to engage in additional advertising, again citing the Zeigler Memo.

DISCUSSION

The "Zeigler Memo" addresses the assessment of Reduction in Recruitment requests in view of industry layoffs. As explained in *Compaq Computer Corp*., 2002-INA-249 (Sept. 3, 2003), slip op. at n.3:

> The Ziegler Memoranda were issued in clarification of GAL 1-97

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2 The Board, *in Richard Clarke Associates*, 1990-INA-80 (May 13, 1992)(en banc), concluded that "the CO is required to stated clearly whether he has denied an employer's request for reconsideration . . . or has granted the request and, upon reconsideration, affirmed the denial of certification." Because this caselaw has been in effect for over a decade, but COs often continue to fail to rule on motions for reconsideration, the Board has stopped automatically remanding such cases for a ruling on the motion. Rather, in view of the COs' failure to follow the *Richard Clarke* precedent, we will draw an inference that the CO fully considered the motion -- including any new evidence and argument presented with the motion -- and rejected it. We will, therefore, consider any such new evidence or argument to have been in the record before the CO and therefore proper for consideration before BALCA. *See Construction and Investment Corp*., 1988-INA-55 (Apr. 24, 1989) (en banc).

(Oct. 1, 1996), re-issued as GAL 1-97, Change 1, and published in the Federal Register on May 4, 1999 due to the settlement of unrelated litigation. This GAL was originally issued to promote the RIR process in order to increase efficiency in the permanent labor certification regulations to attempt to deal with increasing workloads with simultaneous declines in staff resources. When GAL 1-97 was published, the U.S. economy was booming and RIRs were an attractive option for employers having difficulty finding adequate supplies of U.S. workers, especially in high-technology industries. When the economy changed in 2001, and certain industries began laying off workers, questions arose from Regional COs about how to analyze RIRs in view of such layoffs, and the Division of Foreign Labor Certification issued the Field Memoranda providing guidance to the Regional COs and State Workforce Agencies. These memoranda are generally referred to in the immigration community as the "Ziegler Memoranda."

The instant case involved a supervised recruitment. Thus, the Zeigler Memo does not provide authority governing the review of this application. Even if the Zeigler Memo applied, we have rejected the argument that it limits the CO's authority to reviewing layoffs only in the six month period prior to the filing of the application. *Solectron Corp*., 2003-INA-143 (Aug. 12, 2004); *Staples, Inc.*, 2003-INA-177 (Sept. 7, 2004).

The authority cited by the CO for looking at layoffs by the Employer pertaining to the same position for which labor certification is sought is the regulation at 20 C.F.R. § 656.24(b)(2)(i). That regulation provides:

> (b) The regional or national Certifying Officer, as appropriate, shall make a determination either to grant the labor certification or to issue a Notice of Findings on the basis of whether or not:
>
> * * *
>
> (2) There is in the United States a worker who is able, willing, qualified and available for and at the place of the job opportunity according to the following standards:
>
> (i) The Certifying Officer, in judging whether a U.S. worker is willing to take the job opportunity, shall look at the documented results of the employer's and the Local (and State) Employment Service office's recruitment efforts, **and shall determine if there are other appropriate sources of workers where the employer should have recruited or**

might be able to recruit U.S. workers.

20 C.F.R. § 656.24(b)(2)(i) (emphasis added). The CO also cited in the NOF the regulation at 20 C.F.R. § 656.20(c)(8), which provides that "Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that ... [t]he job opportunity has been and is clearly open to any qualified U.S. worker."

We find that the CO acted reasonably in inquiring about layoffs by Qwest Communications of Software Engineers in the year 2002 where the supervised recruitment occurred in early 2003. In fact, Qwest communications had laid off five Software Engineers in the same city where the Aliens would work, and 58 Software Engineers nationwide.

The NOF clearly asked the Employer to explain what consideration it had given to laid off U.S. workers for the positions, but the Employer's rebuttal provided no explanation whatsoever. The Motion for Reconsideration/Request for BALCA Review and the Employer's and Aliens' statement of position on appeal do not provide an explanation either of why recently laid off workers were not considered, but rather relies solely on the legal argument that under RIR procedures the CO was not authorized to inquire into layoffs except in the six months prior to the filing of the application. As noted above, this was not a case in an RIR posture, and even if the RIR procedure was relevant, we have held that a CO has the discretion in considering an RIR request to inquire into layoffs occurring at times other than the six months prior to the filing of the application.

The Employer's silence on whether it gave any consideration to recently laid off workers leads to the conclusion that no consideration was given. The CO properly denied the applications pursuant to 20 C.F.R. §§ 656.20(c)(8) and 656.24(b)(2)(i).

ORDER

The Certifying Officer's denials of labor certification in the above-captioned cases are hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.